



Pre-charge bail: A consultation on the introduction of statutory time limits and related changes

Response of Birmingham Law Society

Introduction

Birmingham Law Society is an organisation representing the interests of members from a significant number of firms of Solicitors and some of the Chambers in the West Midlands Criminal Justice area.

We welcome the timely intervention of the Home Secretary which recognises the need to balance the interests of the investigative authorities with those of the liberty of the individual. We are concerned at the inappropriate lengths of time that individuals are subject to the requirement to return to answer bail and broadly support the intention to impose limits on the time frames in which they can be the subject of bail conditions pending investigation.

We also support any initiative which educates front line officers regarding the changes to the statutory arrest criteria enshrined in s.24A PACE 1984 (*check same and implementation date*). Despite the passage of a considerable period of time and high profile civil actions brought against the police (Richardson v Chief Constable of West Midlands Police) the message that individuals should not be arrested unless it can be justified that the exercise of the power is necessary has still not been learned. We remain concerned at the extent to which officers justify arrest on the basis that it is “necessary to secure and preserve evidence” without properly examining the circumstances or making a proportionate judgement.

We recognise that the investigation process may continue notwithstanding the cancellation of bail, or treatment of an individual as a volunteer but hope that setting a statutory time limit for pre-charge bail will have an overall impact on the timeliness of the overall investigative process. We are also conscious of the overarching principle of the Criminal Procedure Rules. Whatever the status of the individual with regards to bail it is undesirable for all parties, particularly those under suspicion, to spend long periods under investigation.

We set out our responses to the consultation questions below:

Q1: To what extent do you agree or disagree that the Police and Criminal Evidence Act should be amended to enable the police to release someone pending further investigation without bail in circumstances where bail is not considered to be necessary?

We strongly agree that the police should be empowered to release suspects without bail pending further investigation. We submit that it remains the duty of the custody officer to satisfy her/himself as to the necessity to detain an individual in custody for the purposes of investigation. We submit that a default position has arisen in which those arrested continue to be detained unnecessarily in instances where the original arrest criteria have ceased to apply. Far more suspects could and we submit should be treated as volunteers. Once detained it is very rare for a suspect's status to be changed. This appears to arise from a reluctance to challenge the status quo or for investigating officers to relinquish the power of detention once its necessity has passed. The proposal to enable the police to release without bail is a natural extension of the need for officers to properly review the need to extend restriction of the liberty of the suspect.

We suggest that the proposed amendment to s.34(5) PACE 1984 is strengthened by amendment to the Codes of Practice to provide improved guidance to custody officers and inspectors reviewing periods of detention.



Q2: To what extent do you agree or disagree that it would be appropriate to change the definition of 'new evidence' (on the basis of which a fresh arrest could be made) to include material that was in the police's possession but which it was not reasonable to have expected them to analyse while the suspect was previously in detention or on bail?

We strongly disagree with this proposed amendment to the definition of "new evidence". We submit that the exercise of the power to restrict the liberty of the individual should be exercised as a measure of last resort and not, as at present despite the guidance of the Codes of Practice, as a matter of course irrespective of the nature and seriousness of the allegation or type of evidence likely to arise.

It is apparent that limitations in funding of the police and Crown Prosecution Service have had an impact upon the ability of both organisations to effectively investigate and review evidence arising in cases where information technology is either a resource or source of evidence. It is commonly the case that police obtain warrants, search and seize computer equipment and media which will not be analysed for months. It is appreciated that the suspect must be prevented from interfering with the course of investigation by the destruction of offending material before it can be seized. However, it is highly questionable that suspects in such cases are routinely interviewed to obtain their preliminary response, subjected to almost entirely speculative questioning and then bailed for months pending analysis, where the clear impediment to efficiency is the ability of hi-tech crime units to analyse the material.

Moreover in such cases suspects are routinely denied the return of the items seized pending analysis of the prospective exhibits, notwithstanding the provisions of s.22 Police and Criminal Evidence Act 1984 governing the retention of material seized. In reality those exhibits are examined in a forensically secure manner where the ghost copy, not the original is subject to examination and it is questionable whether there remains a need to retain the hardware once the memory copied is in the hands of the police. It is more questionable still why the defendant should be the subject of bail, often with stringent conditions as to their residence, doorstep checking by police officers, reporting to a police station and other exclusions which comprise a control measure and have no relevance to the ability of the police to secure or preserve evidence. In instances of suspected viewing of indecent images of children the suspect is almost invariably a person of good character who subsequently becomes subject of conditions that would offend against guidance as to the imposition of a Sexual Offences Prevention Order if s/he were to be convicted. Those control measures can last for months and years before a decision is made upon charge or disposal by the courts affecting the suspects ability to carry on legitimate business, conduct their affairs (such as basic internet banking requirements) and conduct lawful communication with family and friends.

To extend the definition of "new evidence" to include the material seized in such cases would defeat the purpose of imposing a time limit on the police power to bail suspects to return to the police station. An individual subject to such an open ended power of re-arrest lives in fear of the return of the police to their home, work or other environment to re-arrest and is no better off than a person subjected to bail to return.

We submit that the definition of what comprises "new evidence" becomes meaningless if in reality it covers evidence already seized, which has been secured and in relation to which the defendant has no means or power to intervene. The relevance of the word "new" is to matters which justify the further restriction of the liberty of the individual. Otherwise that individual should be treated as a volunteer. We oppose any measure which will further encourage the police to overlook the necessity criteria before an arrest is made. The individual should not be penalised due to matters outside their control and which are the natural result of decisions taken by central Government as to the funding of the Police and Crown Prosecution Service.



Q3: Do you think there should be an absolute maximum period of pre-charge bail?

Yes, we submit that there should be an absolute maximum period of pre-charge bail and endorse the views expressed by Liberty in their response to the College of Policing's consultation on pre-charge bail. We refer to our answers to questions 4 to 6 below.

Q4: If yes, how long should that period be?

We propose that the period should be twenty eight days, subject to provisions as to extension of that time frame. We refer to our more detailed response to question 6 below. In exceptional cases there should be a maximum limit of twelve months, subject to review every six weeks.

Q5: What do you think the benefits of introducing statutory limits for pre-charge bail durations would be?

We refer to our comments above which exemplify the benefits arising. Primarily we submit that introducing statutory limits will achieve the objectives outlined by the Home Secretary in her introduction to the consultation. The changes are necessary to redress the present imbalance which favours the powers of the police and impinges disproportionately upon the liberty of the individual. The police will be required to prioritise genuinely urgent cases and the suspect will not be left languishing on bail for an indefinite period.

Q6: Should there be different periods for different types of case? If yes, which?

We accept, as a reasonable caveat to the imposition of a twenty eight day time limit that there is a necessity for lengthier investigation in some instances. We agree that the police should have the means to seek an extension of the period of pre-charge bail in exceptional cases. We suggest that should be restrictively defined to include only those cases involving international enquiries, homicide, multiple suspects and complex financial examination (such as cases involving large volumes of electronic data/evidence to be served in digital format). We do not agree that the power should be exercisable simply because the matter involves an allegation of fraud or tax evasion, given that those offences are broadly drawn and can involve relatively simple investigations. We submit that a means of controlling disproportionate use of the power can be achieved by indicating criteria which need to be met: cases involving five or more suspects, where the value of the alleged fraud exceeds £100,000 and where it can be established that there is a need to make enquiry of foreign companies, seek the co-operation of international police assets or obtain European arrest warrants.

We do not agree that the power should be exercisable in the case of historic allegations. In the majority of such cases, particularly as they relate to allegations of sexual offending, the material that can be obtained is increasingly limited the longer the period before the allegation was made. Where it can be established that there is a genuine need to obtain third party material such as financial, medical or social services records the exercise of the power may be justifiable given the reliance of the police upon obtaining consent or production orders as well as the co-operation of third party bodies.

It is submitted that extension of pre-charge bail time limits should be on the authority of a Magistrates' court/District Judge at a hearing held in private but to which the media have a right of access, subject to reporting restrictions. We also submit that the power should only be exercisable where the offence alleged is triable on indictment and where the court is satisfied that the investigating officers have conducted the investigation with all due expedition. The court should be required to take account of any delay arising from the decision of the complainant to report the matter and to the prejudicial impact upon the defendant of being required to answer bail. The court should also be required to take account of the time of the police investigation before the suspect was arrested or invited to attend the police station as a volunteer.



We submit that in such cases as extension is justified there should be an upper limit of twelve months with a requirement to review extension every six weeks.

We do not agree that setting an upper limit in relation to summary offences will impact upon the co-operation provided by suspects. The greater use of voluntary interviews as a means to secure and preserve evidence are a means for the police to re-establish a better relationship with the public. Suspects are already aware of the time limits attaching to the charging of summary offences and we have seen no body of evidence which suggests that those time limits are exploited by defendants to avoid charge. In every instance the defendant retains the right not to incriminate themselves and it does not necessarily follow that the process of investigation will give rise to evidence from the interview process that will tend to incriminate the defendant.

We reiterate that the status of the defendant does not limit the power or the ability of the police to continue with their investigation. Placing a limit on the power to bail will focus the minds of investigating officers and their supervisors upon the need to restrict the liberty of the individual. The outcome is expected to be an improvement in efficiency and consequent savings in costs which can be directed to those cases where detention of the individual can genuinely be justified.

Q7: To what extent do you agree or disagree that it should be possible to extend the period of pre-charge bail?

We strongly agree, as per our response above, that the police should be given the power to extend the period of pre-charge bail in exceptional cases, subject to the limitations we have suggested.

Q8: If pre-charge bail could be extended, who should be able to authorise that?

We suggest that pre-charge bail should not be extended other than on the authority of Magistrate/District Judge.

Q9: To what extent do you agree or disagree that the criteria set out above for the authorising of a bail extension are the right ones?

We disagree with the suggestion that the police are initially given the power to extend pre-charge bail and anticipate that the power will be misused. As indicated above we suggest that authorisation should only be granted by a court.

We do not disagree with the suggested criteria save to the extent of the above considerations.

Q10: Are there other criteria that should be added or substituted?

Please refer to the response given at question 6 above. We suggest the following additional criteria:

- the extent to which the complainant has delayed in making the complaint
- the potential prejudice to the defendant arising from that delay
- indictable offences
- power to extend limited to cases involving international enquiries, multiple suspects (five or more) or complex financial examination (value above £100,000), homicide cases
- review required every six weeks
- upper limit of twelve months in total from the date of arrest
- subject to the court being satisfied that exercise of the power is in the interests of justice
- consideration of the length of time of the police investigation prior to the arrest or voluntary attendance of the suspect.



Q11: To what extent do you agree or disagree that the police should seek to agree memoranda of understanding for the provision of evidence from other public bodies rather than seeking production orders from the Crown Court?

We strongly agree for all the reasons cited that the police should seek to reach and enforce memoranda of understanding regarding the provision of evidence by public bodies. However, we are concerned as to the means to safeguard that process by providing for the opportunity to seek a production order where the need arises.

Q12: To what extent do you agree or disagree that individuals who are the subject of pre-charge bail should be able to challenge the duration as well as the conditions in the courts?

We strongly agree that individuals subject to pre-charge bail should be able to challenge the duration and conditions. The need for this independent power to review becomes of increasing importance with the length of the period in question and the greater the extent to which the conditions of bail restrict the liberty of the individual. We anticipate that such reviews will serve to improve the understanding of the police of the conditions the court/prosecuting authority are likely to think appropriate in cases in which defendants are charged.

Q13: Do you think there should be statutory guidance to custody officers and magistrates as to the appropriateness of particular bail conditions? If yes, who should provide it?

We welcome the issuing of statutory guidance to all parties with regard to the appropriateness of bail conditions. We suggest that guidance is issued by the Judicial College.

Q14: To what extent do you agree or disagree that the extension of pre-charge bail should only be available in certain types of case, such as fraud or tax evasion, or those involving international inquiries, or should it be available in all cases where there are exceptional reasons for an extended investigation?

We refer to our answers to questions six and ten above. We agree the power should only apply to certain types of cases and that all parties will benefit from a clear definition of what comprises an exceptional case.

Q15: To what extent do you agree or disagree that there are certain types or characteristics of cases where the 28 day/3 month limit (depending on the model adopted) should not apply?

We strongly disagree with the proposal to exempt a class of cases from the need to obtain judicial authority for an extension of pre-charge bail time limits. We submit that the interests of the investigating authority must be balanced more carefully with the significant impact upon the liberty of the individual caused by being subject to bail pending charge. The court should be required to authorise extension in all cases. If such extension is considered merited by the parties the suspect has option not to oppose the application.

Q16: What alternative arrangements do you think should apply in those types or characteristics of case?

See answer above.

Q17: To what extent do you agree or disagree that, where the reviewing officer or court agrees with the investigating officer that it could harm the interests of justice to disclose sensitive details of the investigation to the suspect, such as where it might enable the suspect to dispose of or tamper with evidence, it should be possible to withhold the details from the suspect and their legal representative?

We agree that there will be instances when it is in the interests of justice not to disclose sensitive information which may enable the suspect to interfere with the investigation. We suggest that where such considerations arise the investigating authority should have the opportunity to make an application to a circuit judge, with an advocate appointed by the court, to whom the sensitive



information is provided who will be able to make representations on the suspect's behalf, to withhold that information in a manner which mirrors existing provision for public interest immunity to apply. Such applications clearly require judicial oversight and it is in part for this reason that we oppose a system in which such oversight is provided by senior police officers (superintendent or above) for applications in the first instance. We submit that such oversight is the province of the judiciary. However, when an application is made to extend time on the basis of information not supplied to the defendant or to his lawyer, then such an application should only be granted by a circuit judge.

Q18: If sensitive details were to be withheld from a suspect so as to not jeopardise an investigation, what procedural safeguards should be incorporated to ensure the system operates fairly?

The application should be made to a circuit Judge to ensure that the application is properly recorded and open to challenge if the defendant is subsequently charged.

Q19: To what extent do you agree or disagree that the Crown Court should take responsibility for certain types of case at an earlier point?

We strongly disagree that the Crown Court should take responsibility for cases pre-charge. We submit that this would not sit well with the general functions of the Crown Court and would result in Judge's decisions being challenged in the High Court before the point of charge.

Q20: If the Crown Court were to take responsibility for certain types of case at an earlier point, when and what types or characteristics of case should these arrangements apply to?

We do not agree with the proposal and so do not submit that specific case types or characteristics should apply, save as indicated above.

Q21: To what extent do you agree or disagree that the introduction of these changes would be likely to influence the speed with which investigations are dealt with?

As indicated above the potential for challenge in the High Court would be likely to negatively impact on time frames for resolving the issues at hand.

Q22: For your organisation, what would be the resource implications of each model set out above?

Any model adopted would need to ensure access to justice for the individual by being appropriately funded. These are not matters in which the defence will have the opportunity to obtain a Representation Order under current funding arrangements being pre-charge. Equally we submit that such applications can not properly be brought within the remit of the court duty solicitor scheme, given the need for the representative to have been provided with adequate disclosure and instructions. Applications of this nature, such as those involving warrants for further detention, are not readily subsumed into the work load of the duty solicitor. We submit that they should be the subject of separate funding. It is not acceptable for the work entailed to be included within the fixed fee provisions currently applying to representation during the investigation stage. We suggest that the funding arrangement should mirror that in place where a suspect applies to vary bail imposed by the police prior to the first court hearing.

Q23: Do you have a preference between the two models? If you do, why? *Model 1 / Model 2*

Assuming the alternative proposed is not acceptable our preference is for the adoption of model 1. Experience suggests that senior police officers are generally slow and/or unwilling to be perceived to undermine the decisions of investigative officers. This is particularly true of matters investigated by force CID departments. The more significant the allegation, the less likely the senior officer is to accept representations made on behalf of the suspect.

In addition we raise our concern as to the likely impact of pre-charge advice provided by the prosecuting authority prior to an application being made to extend the pre-charge bail time limit.



We cite for example the apparent delegation by custody officers to the Crown Prosecution Service of consideration of bail at the point of charge. Since the inception of pre-charge advice there has been a marked reluctance on the part of custody officers to do more than note the representations made as to bail, as opposed to properly considering them and exercising the power of the custody officer in accordance with the provisions of PACE. We fear that without amendment to the Codes of Practice similar difficulties will arise.

Our proposal is for a third model in which review by an Inspector is removed in favour of review by a Magistrate's court or District Judge of an application to extend for an initial period of twenty eight days.

We submit that the review should be concerned with the principle of an extension of the period of pre-charge bail, the length of that extension and the bail conditions proposed by the police. To arrange the system otherwise will artificially require the defence to make a separate application, which comprises inefficient use of court time and the resources of all parties involved.

We disagree that time spent awaiting review by the Crown Prosecution Service should not count towards the time limit. To provide otherwise is to enable the police and Crown Prosecution Service to entirely circumvent the need for the extension by purporting to have referred the matter. Experience shows that reviews by the Crown Prosecution Service can be time consuming, result in instruction to the police to conduct further enquiries and be delayed depending on varying operational issues affecting that body (i.e. staffing levels, sickness levels, case load, influx of serious cases, budget and ability to re-arrange resources to make use of agents and free up Crown Prosecutors to conduct such reviews). The attempts of West Midlands Crown Prosecution Service to implement CJSSS, Transforming Summary Justice and Prosecution Not Process have been hampered by these factors. The proposed changes will add another layer of review, increase demands upon advocacy allocations and must, just as with the defence, be resourced by appropriate funding.

Although we welcome the simplification of the route of appeal subject to judicial review, we express concern given the recent proposals for restriction of the right of Judicial Review and the difficulties of obtaining public funding for such cases. We refer you to the relevant submissions of Liberty, The Law Society, Criminal Law Solicitors Association, London Criminal Courts Solicitors Association and Birmingham Law Society (amongst others) to those proposals. In short when individuals are denied access to judicial review either by means of scope or funding they are denied access to justice. We seek reassurance that judicial review applications in this arena will be properly funded and exempted from restrictions on review.

We ask that the following issues are also taken into consideration outside the scope of the specific questions posed by the questionnaire.

We are concerned that the economic impact assessment does not take into consideration increased costs arising from the need to provide public funding (legal aid) for representation upon reviews of pre-charge bail extensions. As indicated above in our responses we submit that for the proposed amendments to prove successful and for there to be adequate access to justice for suspects, there must be appropriate funding of the Police, Crown Prosecution Service and Defence representatives.

A handwritten signature in cursive script, appearing to read 'Eileen Snopce'.

President, Birmingham Law Society